

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MARVIN D. RICHARD,  
Petitioner,  
v.

JERRY HOWELL, *et al.*,  
Respondents.

Case No. 2:18-cv-00181-KJD-NJK

**ORDER**

Introduction

In this habeas corpus action, brought by Nevada prisoner Marvin D. Richard, who is represented by appointed counsel, Richard's third amended habeas petition is before the Court for resolution of the merits of the remaining claims. The Court will deny Richard's petition, as is explained below.

Background

On October 13, 2010, Richard was convicted, after a jury trial, in Nevada's Eighth Judicial District Court (Clark County), of second-degree murder with use of a deadly weapon, and he was sentenced to 10 to 25 years in prison for the murder and an additional and consecutive 3 to 8 years for the use of a deadly weapon. See Judgment of Conviction, Exh. 2 (ECF No. 9-2). The conviction was the result of Richard's killing, by stabbing, of his long-time live-in girlfriend, Loreal Goodwin.

Richard appealed, and the Nevada Supreme Court affirmed the judgment of conviction on June 8, 2011. See Order of Affirmance, Exh. 6 (ECF No. 9-6).

Richard filed a pro se state habeas petition on February 21, 2012. See Petition for Writ of Habeas Corpus, Exh. 8 (ECF No. 9-8). Counsel was appointed for Richard, and, with counsel, Richard supplemented his petition. See Supplemental Petition for

1 Post-Conviction Writ of Habeas Corpus, Exh. 11 (ECF Nos. 9-11, 10-1, 10-2); Amended  
2 Supplemental Petition for Post-Conviction Writ of Habeas Corpus, Exh. 13 (ECF No. 10-  
3 4). The state district court held an evidentiary hearing on August 28, 2014. See  
4 Transcript of Evidentiary Hearing, Exh. 161 (ECF No. 40-1). After the evidentiary  
5 hearing, the court appointed an expert on battered-spouse syndrome to evaluate  
6 Richard. See Order Appointing Dr. Shera Bradley, Ph.D. as Court Appointed  
7 Psychologist, Exh. 17 (ECF No. 11-2). The court ordered supplemental briefing, and  
8 Richard filed a second supplemental petition. See Second Supplemental Petition for  
9 Writ of Habeas Corpus, Exh. 18 (ECF No. 11-3). Then, after entertaining oral argument,  
10 the state district court denied Richard's petition in a written order filed on August 17,  
11 2016. See Transcript of Proceedings, January 20, 2016, Exh. 180 (ECF No. 40-20);  
12 Findings of Fact, Conclusions of Law and Order, Exh. 22 (ECF No. 11-7). Richard  
13 appealed, and the Nevada Court of Appeals affirmed the denial of Richard's petition on  
14 August 16, 2017. See Order of Affirmance, Exh. 28 (ECF No. 11-13).

15 This Court received a pro se petition for writ of habeas corpus from Richard,  
16 initiating this action, on January 31, 2018. See Petition for Writ of Habeas Corpus, p. 1  
17 (ECF No. 1-1, p. 2). The Court granted Richard's motion for appointment of counsel,  
18 and appointed counsel to represent him. See Order entered February 9, 2018 (ECF No.  
19 4). With counsel, Richard filed a first amended petition on March 23, 2018 (ECF No. 8),  
20 a second amended petition on October 4, 2018 (ECF No. 18), and a third amended  
21 petition, now his operative petition, on April 22, 2019 (ECF No. 50).

22 In his third amended petition, Richard asserts the following grounds for habeas  
23 corpus relief:

24 1A. Richard's federal constitutional rights were violated as a result of  
25 ineffective assistance of his trial counsel, on account of his trial counsel's  
26 failure "to call lay witnesses in support of the theory of self-defense."  
27  
28

1B. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure "to present expert evidence regarding psychological issues involving intimate partner violence."

1C. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, because "trial counsel tricked Mr. Richard into testifying in his defense."

1D. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, because "counsel didn't ask Mr. Richard about Ms. Goodwin's aggressive nature."

1E. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, because "counsel failed to follow up on juror tampering."

1F. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel's failure "to litigate the issue whether the police acted in bad faith when they failed to test Mr. Richard's blood."

2. Richard's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, because of trial counsel's failure to present certain evidence in mitigation at Richard's sentencing.

3. Richard's federal constitutional rights were violated because, when he decided to testify at trial, Richard "did not knowingly and voluntarily waive his right against self-incrimination."

4. Richard's federal constitutional rights were violated because "[t]he jury's verdict was contaminated by juror misconduct and tampering."

5. Richard's federal constitutional rights were violated because "[t]he State failed to preserve material evidence by not testing Mr. Richard's blood, it made that decision in bad faith, and the relevant detective lied about that under oath."

6. Richard's federal constitutional rights were violated because "[t]he State failed to timely turn over relevant discovery to defense counsel."

Third Amended Petition (ECF No. 51), pp. 11–35.

On May 22, 2019, Respondents filed a motion to dismiss (ECF No. 52), arguing that Grounds 1C, 1D and 3 of Richard's third amended petition are barred by the statute of limitations, and that Grounds 1B, 1C, 1D, 1E, 1F, 3, 4 and 5 are, in part or in their entirety, unexhausted in state court. The Court ruled on the motion to dismiss on November 5, 2019. See Order entered November 5, 2019 (ECF No. 61). The Court dismissed Grounds 1C, 1D, 3 and 4, and the part of Ground 5 asserting that Richard's

1 federal constitutional rights were violated because the detective lied under oath; the  
 2 Court denied the motion in all other respects. See *id.*

3 Respondents then filed an answer on March 3, 2020 (ECF No. 66), and Richard  
 4 filed a reply on August 7, 2020 (ECF No. 74).

5 Along with his reply, on August 7, 2020, Richard filed a motion for an evidentiary  
 6 hearing (ECF No. 75). Respondents filed an opposition to that motion on August 21,  
 7 2020 (ECF No. 76), and Richard filed a reply on August 26, 2020 (ECF No. 77).

## 8 Analysis

### 9 Standard of Review

10 28 U.S.C. § 2254(d), enacted as part of the Antiterrorism and Effective Death  
 11 Penalty Act (AEDPA), sets forth the primary standard of review applicable in a federal  
 12 habeas corpus action:

13 An application for a writ of habeas corpus on behalf of a person in  
 14 custody pursuant to the judgment of a State court shall not be granted with  
 15 respect to any claim that was adjudicated on the merits in State court  
 proceedings unless the adjudication of the claim—

16 (1) resulted in a decision that was contrary to, or  
 17 involved an unreasonable application of, clearly established  
 Federal law, as determined by the Supreme Court of the  
 United States; or

18 (2) resulted in a decision that was based on an  
 19 unreasonable determination of the facts in light of the  
 evidence presented in the State court proceeding.

20 28 U.S.C. § 2254(d). A state court decision is contrary to clearly established Supreme  
 21 Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), “if the state court  
 22 applies a rule that contradicts the governing law set forth in [the Supreme Court’s]  
 23 cases” or “if the state court confronts a set of facts that are materially indistinguishable  
 24 from a decision of [the Supreme Court] and nevertheless arrives at a result different  
 25 from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
 26 (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A state court decision is an  
 27 unreasonable application of clearly established Supreme Court precedent, within the  
 28 meaning of 28 U.S.C. § 2254(d)(1), “if the state court identifies the correct governing

1 legal principle from [the Supreme Court's] decisions but unreasonably applies that  
2 principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*,  
3 529 U.S. at 413). The "unreasonable application" clause requires the state court  
4 decision to be more than incorrect or erroneous; the state court's application of clearly  
5 established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at  
6 409). The analysis under section 2254(d) looks to the law that was clearly established  
7 by United States Supreme Court precedent at the time of the state court's decision.  
8 *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

9 The Supreme Court has instructed that "[a] state court's determination that a  
10 claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could  
11 disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562  
12 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The  
13 Supreme Court has also instructed that "even a strong case for relief does not mean the  
14 state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S.  
15 at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (AEDPA standard is "a  
16 difficult to meet and highly deferential standard for evaluating state-court rulings, which  
17 demands that state-court decisions be given the benefit of the doubt" (internal quotation  
18 marks and citations omitted)).

19 The state courts' "last reasoned decision" is the ruling subject to section 2254(d)  
20 review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). When a state  
21 appellate court does not provide an explanation for its decision, the federal habeas  
22 court "should 'look through' the unexplained decision to the last related state-court  
23 decision that does provide a relevant rationale" and "presume that the unexplained  
24 decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018);  
25 *see also Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991) (the federal court may look  
26 through to the last reasoned state court decision).

27 Where the state court summarily denied a claim but there is no reasoned state-  
28 court decision on the claim, a presumption exists that the state court adjudicated the

1 claim on the merits, unless “there is reason to think some other explanation for the state  
2 court’s decision is more likely.” *Harrington*, 562 U.S. at 99–100. In that case, a  
3 reviewing federal court “must determine what arguments or theories supported or ...  
4 could have supported, the state court’s decision; and then it must ask whether it is  
5 possible fairminded jurists could disagree that those arguments or theories are  
6 inconsistent with the holding in a prior decision of [the Supreme] Court.” *Id.* at 102.

7 In considering a habeas petitioner’s claims under section 2254(d), the federal  
8 court takes into account only the evidence presented in state court. *Pinholster*, 563 U.S.  
9 at 185–87.

10 The federal court’s review is de novo for claims not adjudicated on their merits by  
11 the state courts. See *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Porter v. McCollum*, 558  
12 U.S. 30, 39 (2009).

### 13 Procedural Default and *Martinez*

14 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that a  
15 state prisoner who fails to comply with the state’s procedural requirements in presenting  
16 claims is barred by the adequate and independent state ground doctrine from obtaining  
17 a writ of habeas corpus in federal court. *Coleman*, 501 U.S. at 731–32 (“Just as in those  
18 cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who  
19 has failed to meet the State’s procedural requirements for presenting his federal claims  
20 has deprived the state courts of an opportunity to address those claims in the first  
21 instance.”). Where such a procedural default constitutes an adequate and independent  
22 state ground for denial of habeas corpus, the default may be excused only if “a  
23 constitutional violation has probably resulted in the conviction of one who is actually  
24 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting  
25 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

26 To demonstrate cause for a procedural default, the petitioner must “show that  
27 some objective factor external to the defense impeded” his efforts to comply with the  
28 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external

1 impediment must have prevented the petitioner from raising the claim. See *McCleskey*  
 2 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner  
 3 bears “the burden of showing not merely that the errors [complained of] constituted a  
 4 possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
 5 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,  
 6 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170  
 7 (1982).

8 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective  
 9 assistance of post-conviction counsel may serve as cause to overcome the procedural  
 10 default of a claim of ineffective assistance of trial counsel. The *Coleman* Court had held  
 11 that the absence or ineffective assistance of state post-conviction counsel generally  
 12 could not establish cause to excuse a procedural default because there is no  
 13 constitutional right to counsel in state post-conviction proceedings. See *Coleman*, 501  
 14 U.S. at 752–54. In *Martinez*, however, the Supreme Court established an equitable  
 15 exception to that rule, holding that the absence or ineffective assistance of counsel at  
 16 an initial-review collateral proceeding may establish cause to excuse a petitioner's  
 17 procedural default of substantial claims of ineffective assistance of trial counsel. See  
 18 *Martinez*, 566 U.S. at 9. The Court described “initial-review collateral proceedings” as  
 19 “collateral proceedings which provide the first occasion to raise a claim of ineffective  
 20 assistance at trial.” *Id.* at 8.

#### 21 Standards Governing Claims of Ineffective Assistance of Counsel

22 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court  
 23 propounded a two-part test for analysis of claims of ineffective assistance of counsel:  
 24 the petitioner must demonstrate (1) that the attorney’s representation “fell below an  
 25 objective standard of reasonableness,” and (2) that the attorney’s deficient performance  
 26 prejudiced the defendant such that “there is a reasonable probability that, but for  
 27 counsel’s unprofessional errors, the result of the proceeding would have been different.”  
 28 *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of



counsel must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. *Id.* at 689. The petitioner’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To establish prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, the errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

Where a state court previously adjudicated a claim of ineffective assistance of counsel under *Strickland*, establishing that the state court’s decision was unreasonable is especially difficult. See *Harrington*, 562 U.S. at 104–05. In *Harrington*, the Supreme Court instructed:

The standards created by *Strickland* and § 2254(d) are both “highly deferential,” [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles [v. Mirzayance]*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.

*Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (“When a federal court reviews a state court’s *Strickland* determination under AEDPA, both AEDPA and *Strickland*’s deferential standards apply; hence, the Supreme Court’s description of the standard as ‘doubly deferential.’ [*Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam)].”).

#### Grounds 1A, 1B and 2

In Ground 1A, Richard claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel, on account of his trial counsel’s failure “to call lay witnesses in support of the theory of self-defense.” Third Amended Petition (ECF No. 51), pp. 11–19. In Ground 1B, Richard claims that his federal



1 constitutional rights were violated as a result of ineffective assistance of his trial  
 2 counsel, on account of his trial counsel's failure "to present expert evidence regarding  
 3 psychological issues involving intimate partner violence." *Id.* at 19–25. In Ground 2,  
 4 Richard claims that his federal constitutional rights were violated as a result of  
 5 ineffective assistance of his trial counsel, because of trial counsel's failure to present  
 6 certain evidence—the same evidence he points to in Grounds 1A and 1B—in mitigation  
 7 at Richard's sentencing. *Id.* at 31–32.

8 Richard asserted these claims in his state habeas action. See Supplemental  
 9 Petition for Post-Conviction Writ of Habeas Corpus, Exh. 11 (ECF Nos. 9-11, 10-1, 10-  
 10 2); Amended Supplemental Petition for Post-Conviction Writ of Habeas Corpus, Exh. 13  
 11 (ECF No. 10-4). The state district court held an evidentiary hearing, at which Richard  
 12 and his trial counsel testified. See Transcript of Evidentiary Hearing, Exh. 161 (ECF No.  
 13 40-1). After the evidentiary hearing, the court appointed an expert on battered-spouse  
 14 syndrome to evaluate Richard. See Order Appointing Dr. Shera Bradley, Ph.D. as Court  
 15 Appointed Psychologist, Exh. 17 (ECF No. 11-2). Then, after entertaining supplemental  
 16 briefing (see Second Supplemental Petition for Writ of Habeas Corpus, Exh. 18 (ECF  
 17 No. 11-3)) and oral argument (see Transcript of Proceedings, January 20, 2016, Exh.  
 18 180 (ECF No. 40-20)), the state district court denied relief. See Findings of Fact,  
 19 Conclusions of Law and Order, Exh. 22 (ECF No. 11-7). Richard appealed, and the  
 20 Nevada Court of Appeals affirmed, ruling as follows on these claims:

21 First, Richard argued his trial counsel was ineffective for failing to  
 22 present a defense based upon battered spouse syndrome and for failing  
 23 to present witnesses who could have supported such a defense. Richard  
 24 failed to demonstrate his trial counsel's performance was deficient or  
 25 resulting prejudice. "Where counsel and the client in a criminal case  
 26 clearly understand the evidence and the permutations of proof and  
 27 outcome, counsel is not required to unnecessarily exhaust all available  
 28 public or private resources" in order to properly represent a defendant.  
*Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). At the  
 evidentiary hearing, trial counsel testified Richard informed him of the  
 victim's aggressive actions and he examined battered spouse syndrome  
 as a possible defense, but concluded there were problems with such a  
 defense in this matter and focused on self-defense for the trial. Trial  
 counsel also testified he interviewed witnesses who could have testified  
 regarding the relationship between Richard and the victim, as well as

1 Richard's reaction to confrontation, but chose not to present their  
2 testimony at trial out of a concern they would contradict Richard's  
3 testimony. Tactical decisions such as these "are virtually unchallengeable  
4 absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853,  
5 784 P.2d 951, 953 (1989), which the district court concluded Richard did  
6 not demonstrate. Substantial evidence supports the district court's  
7 conclusion in this regard.

8 In addition, the expert-witness report Richard presented during  
9 the postconviction proceedings did not diagnose Richard with battered  
10 spouse syndrome, but rather concluded he had different conditions  
11 stemming from his difficult upbringing and substance abuse. Under these  
12 circumstances, Richard failed to demonstrate a reasonable probability of a  
13 different outcome at trial had counsel presented a defense based upon  
14 battered spouse syndrome or presented witnesses in an effort to support  
15 such a defense. Therefore, we conclude the district court did not err in  
16 denying this claim.

17 Second, Richard argued his trial counsel was ineffective for  
18 failing to present evidence to support Richard's theory of self-defense.  
19 Richard failed to demonstrate his trial counsel's performance was deficient  
20 or resulting prejudice. As stated previously, trial counsel testified at the  
21 evidentiary hearing he interviewed witnesses in preparation for trial, but  
22 chose not to present their testimony at trial out of a concern they would  
23 contradict Richard's testimony. Tactical decisions such as these "are  
24 virtually unchallengeable absent extraordinary circumstances," *id.*, which  
25 the district court concluded Richard did not demonstrate. Substantial  
26 evidence supports the district court's conclusion in this regard. In addition,  
27 during trial Richard testified regarding his belief in his need to act in self-  
28 defense and counsel questioned him at length regarding his thoughts and  
actions during the incident. As Richard testified regarding the incident and  
the witnesses Richard identified did not actually witness the incident that  
caused the victim's death, Richard failed to demonstrate a reasonable  
probability of a different outcome had trial counsel presented these  
potential witnesses at trial in support of Richard's assertion of self-  
defense. Therefore, we conclude the district court did not err in denying  
this claim.

Third, Richard argued his trial counsel was ineffective for  
failing to present mitigation evidence or expert witness testimony at the  
sentencing hearing regarding Richard's mental health issues and history  
of suffering abuse. Richard failed to demonstrate his trial counsel's  
performance was deficient or resulting prejudice. Trial counsel filed a  
sentencing memorandum that included a report prepared by a  
psychologist who interviewed Richard at length. The report noted  
Richard's abusive upbringing and psychological difficulties. During the  
sentencing hearing, Richard's counsel referenced the sentencing  
memorandum and the sentencing court stated it had read the report.  
Richard failed to demonstrate these were the actions of an objectively  
unreasonable defense attorney. As trial counsel filed a sentencing  
memorandum containing information regarding Richard's mental health  
issues and history of suffering abuse, Richard failed to demonstrate a  
reasonable probability of a different outcome at the sentencing hearing  
had counsel presented further information of this nature. Therefore, we  
conclude the district court did not err in denying this claim.

1           Next, Richard argues the district court erred in declining to  
2           conduct a second evidentiary hearing after Richard supplemented the  
3           postconviction record with a report regarding a new psychological  
4           examination. Following the first evidentiary hearing, the district court  
5           permitted Richard to retain an expert to further investigate whether a  
6           defense based upon battered spouse syndrome would have been  
7           appropriate. As noted previously, the resulting report did not indicate  
8           Richard suffered from battered spouse syndrome. Given the nature of the  
9           report, the district court concluded a new evidentiary hearing was not  
10          necessary and denied the petition. Because a claim based upon battered  
11          spouse syndrome would not have entitled Richard to relief, we conclude  
12          the district court properly denied the petition without conducting a second  
13          evidentiary hearing. See *Hargrove v. State*, 100 Nev. 498, 502–03, 686  
14          P.2d 222, 225 (1984).

15          Order of Affirmance, Exh. 28 (ECF No. 11-13), pp. 2–4. This ruling by the Nevada Court  
16          of Appeals was not unreasonable.

17          In Ground 1A, Richard claims that his trial counsel should have called several  
18          lay witnesses to support his defense. See Third Amended Petition (ECF No. 51), pp.  
19          11–19. But, as the Nevada Court of Appeals noted, Richard’s trial counsel testified that  
20          he knew of those potential witnesses, knew how they would testify, and considered  
21          calling them to testify, but decided not to, because calling them would present a danger  
22          of discrediting Richard’s own testimony. See Transcript of Evidentiary Hearing, Exh.  
23          161, pp. 32–36 (ECF No. 40-1, pp. 33–37). Specifically, counsel testified as follows:

24               Credibility is key. My client testified. It was very important to me that our  
25               defense was consistent. I didn’t want any witnesses that were going to  
26               take the stand and impeach my -- any of my own witnesses take the stand  
27               and impeach my own client.

28          *Id.* at 33 (ECF No. 40-1, p. 34). Counsel also testified as follows, under questioning by  
the court:

          A. .... And you’re right, there were witnesses that were going to  
testify to previous instances I think as well. And there were, in my opinion  
when you take the stand your credibility is the most important aspect of  
your testimony. And in my memory I was concerned that they would not  
be consistent with what my client testified to on the stand.

          And the only person who knew or didn’t know what happened in the  
apartment, which is where the actual incident took place was my client.  
There was only the two of them. And the victim of course is deceased. So  
it was paramount to me that my client had credibility when he testified  
before the jury. So I didn’t want to have witnesses that would come in and

1 provide information that was inconsistent with what he said, because what  
2 he said was so crucial.

3 Q. So before or as you were making that decision had you  
4 actually talked to those witnesses yourself and so you knew what they  
5 were going to say and made the decision after hearing your client's  
6 testimony, that this witness is going to contradict my client?

7 A. That is correct.

8 *Id.* at 34–35 (ECF No. 40-1, pp. 35–36).

9 There was evidence before the state district court corroborating trial counsel's  
10 testimony that he believed the possible witnesses suggested by Richard could reveal  
11 information that would be harmful to Richard's case. For example, an investigator's  
12 report of an interview with potential witness Elbert Black stated:

13 Elbert said that he noticed a change in Marvin after Marvin started to use  
14 "sherms" laced with embalming fluid. It was a mental change and Elbert  
15 didn't like it. It bothered Elbert so much that he had mentioned to his  
16 mother and father ... that somebody had to get Marvin some help with his  
17 addiction. Elbert said that when Marvin was living with him, he didn't allow  
18 Marvin to smoke "sherms" ....

19 \* \* \*

20 Elbert seems to remember something about Elbert and Loreal 's mother,  
21 Laura, having some argument ... and that Laura had a restraining order  
22 out against Marvin.

23 \* \* \*

24 Elbert said that over the years Loreal and Marvin would come to his  
25 house to visit and at least once he remembers seeing a bruise on Loreal's  
26 arm. Elbert would ask what happened and Loreal would tell Elbert that she  
27 and Marvin would be wrestling and playing around. Elbert said that he  
28 believes that was something Loreal and Marvin did often and that was  
wrestling and playing around. Elbert said that he does not remember  
[ever] seeing any bruises on Marvin.

Investigator's Report of Interview with Elbert Black, Exh. 4 to Supplemental Petition  
(ECF No. 9-11, pp. 165–67). Another example is an investigator's report of an interview  
with potential witness Asha Hollman:

... [S]he came to realize that both Loreal and Marvin had mental  
issues. She said that both would start arguments over little things and the  
verbal arguments would escalate into yelling and calling each other names  
and using cuss words.

\* \* \*

... Loreal showed Asha a photo of herself in her cell phone. Loreal had a right black eye in the photo and Loreal told Asha that Marvin had hit her. Asha said that Marvin was just [as] bad as Loreal. He would raise his voice, cuss, and use foul language also.

\* \* \*

Asha said that Loreal would drink alcohol and on at least one [occasion] that she is aware of Marvin had come home after using “sherm’s”. On one of those occasions Loreal got mad at Marvin for using ‘sherms”.

Investigator’s Report of Interview with Asha Hollman, Exh. 6 to Supplemental Petition (ECF No. 9-11, pp. 175–76); see *also* Written Statement of Erin Black, Exh. 5 to Supplemental Petition (ECF No. 9-11, pp. p. 169) (“During the time we were together, I’ve never seen, witnessed, nor been involved in any disputes with him except one instance. It was the year of 2005. I filed a statement but never [pursued] or pressed charges.”); Incident Report, Regarding Battery/Domestic Violence Incident, Exh. 8 to Supplemental Petition (ECF No. 9-11, pp. 187–88); Report Regarding Domestic Violence Investigation, Exh. 9 to Supplemental Petition (ECF No. 9-11, pp. 191–92) (Alexis Lintgeris-Porto’s statement to police regarding incident in Walmart parking lot); Incident Report, Exh. 10 to Supplemental Petition (ECF No. 9-11, pp. 194–98 (regarding incident in Walmart parking lot); Investigator’s Report of Interview with Brenda Smith, Exh. 16 to Supplemental Petition (ECF No. 10-1, p. 48) (Brenda Smith was aware of Richard’s use of “sherm”).

Therefore, there was substantial evidence, presented in the state habeas action, indicating that Richard’s trial counsel had available the witnesses suggested now by Richard, and knew how they would testify, but he made a sound strategic decision not to call them to testify. See *Strickland*, 466 U.S. at 690–91 (“[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”); see *also Rhode v. Hall*, 582 F.3d 1273, 1284 (11th Cir. 2009) (“Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess”). This Court finds that

1 the Nevada Court of Appeals' ruling in this regard was not objectively unreasonable.  
2 The Court will deny habeas corpus relief on Ground 1A.

3 In Ground 1B, Richard claims that his trial counsel was ineffective for not  
4 presenting expert testimony at trial regarding his alleged psychological conditions,  
5 including posttraumatic stress disorder (PTSD) and battered spouse syndrome.  
6 Specifically, Richard points to the reports of Dr. Michelle Carro (Exh. 113 (ECF No. 38-  
7 15)) and Dr. Shera Bradley (Exh. 35 (ECF No. 21-1) (sealed)), and he asserts that his  
8 trial counsel should have presented testimony of Dr. Carro and/or Dr. Bradley, or similar  
9 testimony. See Third Amended Petition (ECF No. 51), pp. 19–25. The Nevada Court of  
10 Appeals reasonably determined that Richard's trial counsel did not perform  
11 unreasonably in this manner, and, at any rate, Richard was not prejudiced.

12 Dr. Carro's report described Richard's difficult childhood, but Dr. Carro did not  
13 diagnose Richard as suffering from PTSD. See Report of Dr. Michelle Carro, Exh. 113  
14 (ECF No. 38-15). Dr. Carro's report does not make any mention of abuse of Richard by  
15 Loreal, and it provides no support for a theory that Richard suffered from PTSD as a  
16 result of such abuse, or that he suffered from battered spouse syndrome. See *id.* On the  
17 other hand, Dr. Carro's report included a statement that Richard "believed that he  
18 needed to compromise his opinions and desires first before things would eventually turn  
19 his way," and "this led to a build up of anger and resentment which would manifest itself  
20 in passive-aggressive behavior, psychosomatic symptoms, substance abuse and  
21 occasional uncontrolled outbursts of temper." See *id.* at 3 (ECF No. 38-15, p. 6).  
22 Dr. Carro also stated in her report: "Mr. Richard is a gentleman with a poorly developed  
23 sense of self and underdeveloped ability to cope effectively in the face of adult stressors  
24 and relationships." *Id.* at 4 (ECF No. 38-15, p. 7). Dr. Carro's report refers repeatedly to  
25 Richard's abuse of drugs. See *id.* There is nothing in Dr. Carro's report that would have  
26 provided any significant support for Richard's self-defense theory, or for a theory that he  
27 suffered from PTSD or battered spouse syndrome as a result of abuse by Loreal.  
28



1 Dr. Bradley's report, like Dr. Carro's, describes events from Richard's difficult  
2 childhood. See Report of Dr. Shera Bradley, Exh. 35 (ECF No. 21-1). Dr. Bradley's  
3 report describes Richard's long-term, heavy use of PCP and other illegal drugs. *Id.* at 4,  
4 6, 13. The report goes on to describe events from Richard's tumultuous, and sometimes  
5 violent, relationship with his ex-wife, Erin Black. See *id.* at 4–5. It describes Richard's  
6 criminal history. *Id.* at 7, 9–10. It notes that Richard “was booked for battery domestic  
7 violence on June 7, 2007 with Loreal listed as the victim.” *Id.* at 7. The report states that,  
8 on the day that Loreal was killed, Richard “smoked PC and was hallucinating” and was  
9 “all scared and paranoid.” *Id.* at 11. Regarding the incident that led to Loreal's death, the  
10 report states: “He stated Loreal was yelling and grabbed a knife and then he grabbed a  
11 knife and ‘poked her’ twice.” *Id.* at 12. Dr. Bradley's report describes Loreal's aggressive  
12 and violent treatment of Richard, and their generally violent relationship (see *id.* at 6,  
13 10–13). Dr. Bradley diagnosed Richard as having PTSD (*id.* at 12), but her report  
14 appears to attribute the PTSD to Richard's childhood, not to his relationship with Loreal.  
15 See *id.* at 13 (“Marvin has experienced a great deal of abuse during his childhood and  
16 he described symptoms that are consistent with PTSD.”). Dr. Bradley's report concludes  
17 as follows:

18 During the two years that Loreal and Marvin were together, there  
19 were repeated physical altercations, some of which resulted in police  
20 involvement. Marvin described that they were selling drugs, he continued  
21 using drugs, and there were infidelities on both parts. He indicated Loreal  
22 engaged in prostitution. Over time, Marvin became increasingly paranoid.  
23 He thought cars were following him and law enforcement was tapping his  
24 phones. The day of the instant offense, Marvin used PCP, alcohol,  
25 marijuana, and cough syrup. He described that he was hallucinating and  
26 was feeling more and more paranoid. He reached out for support, by way  
27 of contacting Ms. Maddox, only to learn that she had Alzheimer's. He  
28 described feeling alone and that these were signs to him. He stated that  
after he went to Ms. Maddox's house, they went shopping, however he  
stayed in the car and smoked more marijuana. After they were back at  
home, he and Loreal were fighting and he reports that he tried to  
disengage from that by going to sleep after drinking Nyquil. After he  
awoke, they engaged in more fighting which ultimately resulted in Marvin  
stabbing Loreal.

From the data available for this evaluation, it seems clear that  
Marvin and Loreal had a conflictual relationship and the day of the crime  
was no different. Marvin's reactions during the altercation with Loreal were



1 fueled by the constant drug abuse during the time leading up to the day, in  
2 addition to the high level of intoxication that was likely present, based on  
3 his self-reported use. He had poor coping skills and did not deal with  
4 conflict well. Many children who have experienced abuse have poor skills  
5 in dealing with altercations and may cower, retreat, or become aggressive  
6 when confronted. It is my opinion that his behavior that day was a

7 combination of the aggressive nature of his relationship with Loreal, his  
8 deficit interpersonal skills, and the effects of the drugs he was using.

9 *Id.* at 13–14. In sum, there is little in Dr. Bradley’s report supporting a theory that  
10 Richard stabbed Loreal in self-defense; on the other hand, the report contains a great  
11 deal of information that would have reflected poorly on Richard and would have been  
12 harmful to his defense.

13 Richard’s trial counsel did not perform unreasonably in choosing not to present,  
14 before the jury, testimony of Dr. Carro or Dr. Bradley, or a similar expert.

15 The Nevada Court of Appeals’ ruling on the claim in Ground 1B was reasonable;  
16 it was not contrary to, or an unreasonable application of, clearly established Federal  
17 law, as determined by the Supreme Court of the United States, and it was not based on  
18 an unreasonable determination of the facts in light of the evidence presented. See 28  
19 U.S.C. § 2254(d). The Court will deny habeas corpus relief on Ground 1B.

20 In Ground 2, Richard claims that his federal constitutional rights were violated as  
21 a result of ineffective assistance of his trial counsel, because of trial counsel’s failure to  
22 present certain evidence—the same evidence he points to in Grounds 1A and 1B—in  
23 mitigation at sentencing. *Id.* at 31–32.

24 Richard’s trial counsel submitted two sentencing memoranda prior to Richard’s  
25 sentencing. The first included the report by Dr. Carro. See Sentencing Memorandum,  
26 Exh. 113 (ECF No. 38-15). The second included a letter from Richard’s ex-wife,  
27 conveying her request that the court show leniency toward Richard. See Supplemental  
28 Sentencing Memorandum, Exh. 114 (ECF No. 38-16). At the sentencing hearing,  
Richard made a lengthy statement. See Transcript of Sentencing, Exh. 116, pp. 3–6  
(ECF No. 39-1, pp. 4–7). Loreal’s mother spoke at the sentencing hearing and asked  
the court to have mercy on Richard. See *id.* at 9–12 (ECF No. 39-1, pp. 10–13). The

1 prosecution asked for consecutive prison sentences of 10 years to life and 8 to 20  
2 years. *See id.* at 3 (ECF No. 39-1, p. 4). The judge sentenced Richard to consecutive  
3 prison sentences of 10 to 25 years and 3 to 8 years. *See id.* at 12–15 (ECF No. 39-1,  
4 pp. 13–16); Judgment of Conviction, Exh. 2 (ECF No. 9-2).

5 The Court determines that the claim in Ground 2 is without merit, and the Nevada  
6 Court of Appeals' affirmance of denial of relief on the claim was reasonable. The record  
7 reflects that, at sentencing, the court had information about Richard's mental health  
8 background and about the relationship between Richard and Loreal. There is no  
9 showing that Richard's counsel acted unreasonably in not presenting other witnesses or  
10 evidence at the sentencing hearing. Certainly, there is no showing that presenting  
11 additional witnesses or evidence would have raised a reasonable probability of a better  
12 outcome; as it was, the judge imposed a lower sentence than was requested by the  
13 State. The Court will deny habeas corpus relief on Ground 2.

14 Richard requests an evidentiary hearing on Grounds 1A, 1B and 2. *See* Motion  
15 for Evidentiary Hearing (ECF No. 75), pp. 6–8. These claims, though, were ruled on, on  
16 their merits, by the state court, and this Court determines that Richard does not show  
17 the state-court rulings to be unreasonable under 28 U.S.C. § 2254(d). Therefore, further  
18 evidentiary development is unwarranted. The Court will deny the motion for an  
19 evidentiary hearing on these claims. *See Pinholster*, 563 U.S. at 185–87.

#### 20 Ground 1E

21 In Ground 1E, Richard claims that his federal constitutional rights were violated  
22 as a result of ineffective assistance of his trial counsel, because “counsel failed to follow  
23 up on juror tampering.” Third Amended Petition (ECF No. 51), pp. 27–29.

24 In ruling on Respondents' motion to dismiss, the Court determined that this claim  
25 was not asserted by Richard in state court, but would now be procedurally barred in  
26 state court, so it is technically exhausted but potentially barred by the procedural default  
27 doctrine. *See* Order entered November 4, 2019 (ECF No. 61), pp. 11–12. The Court  
28 then recognized that Richard might be able to overcome the procedural default by

1 showing, under *Martinez*, that his state post-conviction counsel was ineffective for not  
2 asserting the claim in his state habeas action. See *Id.* However, the Court determined  
3 that the question whether Richard can overcome the procedural default of the claim is  
4 intertwined with its merits, such that the procedural default issue would be better  
5 addressed in conjunction with the claim's merits, in light of Respondents' answer and  
6 Richard's reply. See *id.*

7 On the sixth day of Richard's trial, an alternate juror found, in her juror's  
8 notebook, a piece of paper with the word "guilty" written on it, and she brought this to  
9 the trial court's attention. See Trial Transcript, July 19, 2010, Exh. 98, p. 97 (ECF No.  
10 37-5, p. 33). The judge observed that the note appeared to be on the same size paper  
11 as is in the jury notebooks. See *id.* The judge made the note part of the record. See *id.*  
12 The judge informed counsel that the court reused jury notebooks and it was possible the  
13 note was left in the jury notebook after a previous trial. *Id.* at 97–98 (ECF No. 37-5, pp.  
14 33–34). The judge informed counsel that the previous trial in that court, about two  
15 weeks before, had ended in a guilty verdict. *Id.* at 98 (ECF No. 37-5, p. 34). The next  
16 day, the court brought the alternate juror in for questioning. See Trial Transcript, July  
17 20, 2010, Exh. 100, p. 5 (ECF No. 38-2, p. 6). The alternate juror described how she  
18 found the note in her juror's notebook. See *id.* at 6 (ECF No. 38-2, p. 7). She said she  
19 had taken a lot of notes but had not noticed it before. See *id.* The judge stated:

20 We've looked at it and it does appear to be the same type of paper that's  
21 in those notebooks. We do reuse those notebooks, and in our discussion  
22 we had thought perhaps it was one that was left over in a notebook from a  
previous trial, because they would have taken a vote and done things in  
that previous trial as well. But obviously, we don't know exactly.

23 *Id.* Counsel were given an opportunity to question the alternate juror, and defense  
24 counsel asked her how many pages back in the notebook she found the note, and she  
25 explained that she found it a few pages into the notebook from where she had stopped  
26 writing her notes. See *id.* at 7–8 (ECF No. 38-2, pp. 8–9). Defense counsel also asked if  
27 she had any communications with anyone who suggested that they put the note there,  
28 and she answered that she had not. *Id.* at 8–9 (ECF No. 38-2, pp. 9–10). Then, under

1 questioning by the judge, the alternate juror stated that she was not affected by the  
2 note, and it did not cause her to be swayed in either direction. *Id.* at 9 (ECF No. 38-2, p.  
3 10). The judge then discussed the matter with counsel, and defense counsel stated:

4           Your Honor, I could file an objection and raise the issue, but I've  
5 just, from the beginning, felt that this woman made a very good juror.  
6 She's been always attentive, always following the evidence and, you  
7 know, her notebook shows a book full of notes that she's taken as she  
8 filtered through it here today.

9           So you know, I'm hesitant – the other thing, she's an alternate. I  
10 don't even know – I doubt we'll even get to her at this point. So at this  
11 point, I just appreciate the Court, you know, creating the record and I'm  
12 not going to object or do anything other than I've told the Court, that I  
13 appreciate the work that you've done to find out the facts of this so far.  
14 *Id.* at 10 (ECF No. 38-2, p. 11). The prosecutor similarly expressed that she did not  
15 think anything further had to be done; she stated:

16           And I think – well, defense counsel as well as ourselves had  
17 probably come to the conclusion that no one did it purposefully. It was  
18 probably from an old juror notebook and it just happened to be in there. So  
19 with that, Judge, we'll submit it.

20 *Id.* at 11 (ECF No. 38-2, p. 12). The alternate juror was not excused, and the trial  
21 proceeded.

22           There was—and is—no evidence that the note was placed in the alternate juror's  
23 notebook by another juror or by anyone else involved in Richard's trial, or that it was  
24 meant as a comment on Richard's trial, or that the alternate juror was affected by it.  
25 This claim is based purely on speculation. The evidence, and the conclusion of defense  
26 counsel, the prosecutor, and the judge, was that the note was left in the notebook after  
27 a previous trial and had nothing to do with Richard's trial.

28           This Court determines that this claim of ineffective assistance of trial counsel is  
meritless. Richard's trial counsel performed in a reasonable manner with respect to the  
paper found in the alternate juror's notebook, and, at any rate, there is no showing that  
Richard was prejudiced. The Court finds that this claim is insubstantial, within the  
meaning of *Martinez*, and, therefore, Richard does not meet the standard described in  
*Martinez*. Nor does Richard make any showing that an evidentiary hearing is warranted

1 on this claim; Richard does not give any indication what further he would attempt to do  
2 at an evidentiary hearing to substantiate the claim. The claim will be denied as  
3 procedurally defaulted.

4 Grounds 1F and 5

5 In Ground 1F, Richard claims that his federal constitutional rights were violated  
6 as a result of ineffective assistance of his trial counsel, on account of his trial counsel's  
7 failure "to litigate the issue whether the police acted in bad faith when they failed to test  
8 Mr. Richard's blood." Third Amended Petition (ECF No. 51), pp. 29–31. And, in the part  
9 of Ground 5 remaining to be adjudicated, Richard claims that his federal constitutional  
10 rights were violated because "[t]he State failed to preserve material evidence by not  
11 testing Mr. Richard's blood, [and] it made that decision in bad faith." *Id.* at 33–34; see  
12 also Order entered November 5, 2019 (ECF No. 61) (dismissing the claim in Ground 5  
13 that Richard's federal constitutional rights were violated because the detective lied  
14 under oath).

15 In ruling on Respondents' motion to dismiss, the Court determined that the claim  
16 in Ground 1F was not asserted by Richard in state court, but would now be procedurally  
17 barred in state court, so it is technically exhausted but potentially barred by the  
18 procedural default doctrine. See Order entered November 4, 2019 (ECF No. 61), pp.  
19 11–12. The Court recognized that Richard might be able to overcome the procedural  
20 default by showing, under *Martinez*, that his state post-conviction counsel was  
21 ineffective for not asserting the claim in his state habeas action. See *Id.* However, the  
22 Court determined that the question whether Richard can overcome the procedural  
23 default of the claim is intertwined with its merits, such that the procedural default issue  
24 would be better addressed in conjunction with the claim's merits, in light of  
25 Respondents' answer and Richard's reply. See *id.*

26 Richard alleges that the police acted in bad faith in not having his blood tested for  
27 intoxicants after his arrest. Third Amended Petition (ECF No. 51), pp. 29–31. Richard  
28 alleges that, at the time, he was under the influence of alcohol, PCP, marijuana and

1 Nyquil. *Id.* at 29. He alleges that the effect of these substances, together with sleep  
2 deprivation and other factors, rendered him unable to give a voluntary statement. *Id.*

3 Richard's trial counsel moved to suppress his statement to the police, based in  
4 part on his intoxication, and the court held an evidentiary hearing on the motion. See  
5 Motion to Suppress, Exh. 83 (ECF No. 34-21); Transcript of Richard's Statement to  
6 Police, Exh. 30 (ECF No. 19-1); Trial Transcript, July 14, 2010, Exh. 94, pp. 3–53 (ECF  
7 No. 36-1, pp. 4–54) (evidentiary hearing). Detective Martin Wildemann, who conducted  
8 the interrogation, testified. Trial Transcript, July 14, 2010, Exh. 94, pp. 3–34 (ECF No.  
9 36-1, pp. 4–35). Detective Wildemann testified that, the procedures employed with  
10 respect to a suspect who may be under the influence of a substance, including whether  
11 to have the suspect's blood tested, was a "judgment call." *Id.* at 18–23 (ECF No. 36-1,  
12 pp. 19–24). Detective Wildemann testified that he had never had a blood test done on a  
13 suspect, and he had not heard of that being done by others. *Id.* Detective Wildemann  
14 testified that Richard's gait appeared to be steady, and he was articulate and lucid;  
15 based on such factors, Detective Wildemann believed that Richard was able to give a  
16 voluntary statement. *Id.*

17 The trial judge ruled that, while Richard appeared sleepy on the videotape of the  
18 interrogation, and while he was likely under the influence of some substance, he was  
19 generally alert and able to understand the questions he was asked, his statement was  
20 generally coherent, and he did not appear to be so intoxicated as to be unable to  
21 voluntarily waive his rights and give the statement; the trial court therefore denied the  
22 motion to suppress and ruled Richard's statement admissible. See *id.* at 50–52 (ECF  
23 No. 36-1, pp. 51–53).

24 Richard has filed, as an exhibit, a report of a defense investigator's interview with  
25 Loreal's mother, Laura, that states:

26 She [Laura] stated that Detective [Wildemann] took her aside and  
27 explained to her that off the record he didn't want to see Marvin get an  
28 insanity or under the influence defense because of Sherm. (PCP)

1 Report of Interview with Laura Goodwin, Exh. 31 (ECF No. 19-2, p. 3). Richard claims  
2 that his trial counsel knew of this information but failed to question Detective  
3 Wildemann, or call Laura to testify, to bring it out in support of the motion to suppress.  
4 Third Amended Petition (ECF No. 51), p. 30. Richard claims that if the trial court had  
5 heard about Detective Wildemann's alleged comment to Laura, there is a reasonable  
6 probability the court would have granted the motion to suppress, Richard's statement to  
7 the police would not have come into evidence, and the result of the trial would have  
8 been more favorable for Richard. *Id.* at 30–31.

9 This Court determines that this claim is insubstantial, in that there is no showing  
10 that Richard's trial counsel performed unreasonably, and there is, at any rate, no  
11 showing that Richard was prejudiced.

12 The Court notes first that, when he was arrested, Richard obviously knew that he  
13 was under the influence of PCP, but, while he told the detective that he had consumed  
14 alcohol, marijuana, and Nyquil, he did not mention the PCP. This—not the lack of a  
15 blood test—was the primary reason why Richard's PCP use was not discovered by the  
16 police. Moreover, there was nothing to stop Richard from informing the trial court, in the  
17 context of the motion to suppress, that he had used PCP, and may have been under its  
18 influence when he gave his statement.

19 The Court also notes that, while the report of the investigator's interview with  
20 Laura indicates that Detective Wildemann told Laura that he did not want Richard to  
21 have a defense based on his use of PCP, the report does not indicate that was the  
22 reason that Detective Wildemann did not have Richard's blood tested. That step in the  
23 logic of Richard's claim is unsupported by any evidence and is contradicted by the  
24 testimony of Detective Wildemann's testimony about why he did not have a blood test  
25 done.

26 And, most importantly, the trial court conducted an evidentiary hearing to  
27 determine whether or not Richard was so intoxicated as to be unable to voluntarily  
28 waive his rights and give a statement to the police, and the court ruled that he was not.



1 There is no showing that adding PCP to the mix of substances that Richard had  
2 consumed—or attempting to cast doubt on the detective’s explanation why he did not  
3 have Richard’s blood tested—would have altered the trial court’s view of the effect of  
4 Richard’s intoxication on his ability to voluntarily waive his rights and give a statement to  
5 the police.

6 This Court determines that this claim of ineffective assistance of trial counsel is  
7 without merit. Richard’s trial counsel performed in a reasonable manner, and there is no  
8 showing that Richard was prejudiced. Richard does not give any indication what  
9 evidence he would proffer at any evidentiary hearing to support this claim, and the Court  
10 determines that an evidentiary hearing on the claim is unwarranted. The Court finds this  
11 claim is insubstantial, within the meaning of *Martinez*. The claim will be denied as  
12 procedurally defaulted.

13 In Ground 5, Richard makes the related claim that his federal constitutional rights  
14 were violated because “[t]he State failed to preserve material evidence by not testing  
15 Mr. Richard’s blood, [and] it made that decision in bad faith....” Third Amended Petition  
16 (ECF No. 51), pp. 33–34.

17 Richard asserted the claim in Ground 5 on his direct appeal, and the Nevada  
18 Supreme Court ruled as follows:

19  
20 ... Richard contends that “[t]he State failed to preserve key  
21 evidence by not testing [his] blood-alcohol content on the night of the  
22 incident” and thereby deprived him of due process by preventing him from  
23 presenting an adequate defense at his trial. We construe this claim of  
24 error as a claim that the State failed to collect evidence, see *Daniels v.*  
25 *State*, 114 Nev. 261, 266, 956 P.2d 111, 114 (1998), and, because  
26 Richard failed to present this claim in the court below, we review for plain  
27 error, see NRS 178.602; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93,  
28 94–95 (2003). We conclude that Richard has failed to make a threshold  
showing that the blood evidence was material and the State’s failure to  
gather this evidence was the result of negligence, gross negligence, or  
bad faith, see *Daniels*, 114 Nev. at 267-68, 956 P.2d at 115 (establishing  
two-part test for assessing claims that the State failed to gather evidence),  
and therefore he has not demonstrated plain error.

Order of Affirmance, Exh. 6, p. 2 (ECF No. 9-6, p. 3).

1 As this claim was ruled upon, on its merits, by the Nevada Supreme Court, this  
2 Court considers the claim under the standard set forth in 28 U.S.C. § 2254(d). The claim  
3 fails under that standard, because there is no Supreme Court precedent clearly  
4 establishing that it is a violation of a defendant's federal constitutional rights for law  
5 enforcement to fail to gather potentially exculpatory evidence. See *Arizona v.*  
6 *Youngblood*, 488 U.S. 51, 59 (1988) (“[T]he police do not have a constitutional duty to  
7 perform any particular tests.”); *Miller v. Vasquez*, 868 F.2d 1116, 1119–20 (9th Cir.  
8 1989) (ruling that Supreme Court precedent did not impose upon police a duty to obtain  
9 evidence, as opposed to a duty to preserve evidence that is gathered). Absent Supreme  
10 Court precedent establishing such a constitutional right, AEDPA, as codified at 28  
11 U.S.C. § 2254(d), precludes relief on this claim. See *Carey v. Musladin*, 549 U.S. 70,  
12 76–77 (2006) (holding that “clearly established federal law,” under 28 U.S.C. § 2254(d),  
13 refers to holdings of the United States Supreme Court). The Court will, therefore, deny  
14 relief on Ground 5.

15 Ground 6

16 In Ground 6, Richard claims that his federal constitutional rights were violated  
17 because “[t]he State failed to timely turn over relevant discovery to defense counsel.”  
18 Third Amended Petition (ECF No. 51), pp. 34–35. Richard's claim is that, while the  
19 defense had earlier received a transcript and audio recording of his statement to the  
20 police, the State did not turn over the video recording of his statement until just a few  
21 days before his trial commenced. See *id.* Richard claims that the delay in him receiving  
22 the video record of his statement hampered him in litigating the admissibility of the  
23 statement. See *id.*

24 Richard asserted this claim on his direct appeal, and the Nevada Supreme Court  
25 ruled as follows:

26 ... [A]ppellant Marvin Deandre Richard contends that his due  
27 process rights were violated when the State failed to provide timely  
28 discovery of the video recording of his police interview. He argues that this  
untimely discovery violates *Brady v. Maryland*, 373 U.S. 83 (1963), and its  
progeny and asserts that the district court should have dismissed the

1 charges or granted his motion for a continuance. We conclude that the  
2 untimely discovery did not violate *Brady* because the evidence was  
3 provided before the start of trial, it was not favorable, and it was not  
4 material. See *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)  
5 (identifying the components of a *Brady* violation). Further, the district  
6 court did not abuse its discretion by denying Richard's motions for  
dismissal or continuance because Richard failed to show that the State  
acted in bad faith or that he was prejudiced by the untimely discovery of  
the video recording of the interview. See NRS 174.295(2); *Evans v. State*,  
117 Nev. 609, 638, 28 P.3d 498, 518 (2001).

7 Order of Affirmance, Exh. 6, pp. 1–2 (ECF No. 9-6, pp 2–3).

8 As this claim was ruled upon, on its merits, by the Nevada Supreme Court, this  
9 Court considers the claim under the standard set forth in 28 U.S.C. § 2254(d).

10 In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held  
11 that the “suppression by the prosecution of evidence favorable to an accused upon  
12 request violates due process where the evidence is material either to guilt or  
13 punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373  
14 U.S. at 87. To show a *Brady* violation, a petitioner must demonstrate that: (1) the  
15 suppressed evidence is favorable to the accused, either as exculpatory or impeachment  
16 evidence; (2) the State suppressed the evidence either willfully or inadvertently; and (3)  
17 the defendant was prejudiced because the suppressed evidence was material, i.e.,  
18 there was a reasonable probability that, had the evidence been disclosed, the result of  
19 the proceeding would have been different. *Stickler v. Greene*, 527 U.S. 263, 281–82  
20 (1999); see also *Brady*, 373 U.S. at 87.

21 Richard claims that the videotape of his statement to the police was material  
22 because it showed that he was intoxicated when he gave the statement, and, as such, it  
23 was evidence supporting his motion to suppress the statement. See Third Amended  
24 Petition (ECF No. 51), p. 35. However, the trial court viewed the videotape during the  
25 evidentiary hearing on the motion to suppress, and determined that it showed that, while  
26 Richard was possibly under the influence of some substance, it appeared that he was  
27 alert and coherent, and that he was not so intoxicated as to be unable to voluntarily  
28

1 waive his rights and answer questions. See Trial Transcript, July 14, 2010, Exh. 94, pp.  
2 50–52 (ECF No. 36-1, pp. 51–53).

3 Furthermore, the State did in fact turn over the videotape to the defense in  
4 advance of the trial—the Friday before the Monday commencement of the trial. See  
5 Third Amended Petition (ECF No. 51), pp. 34–35. The prosecutor told defense counsel  
6 and the trial court that she did not receive the videotape from the police until just before  
7 she disclosed it to the defense. See *id.* Richard does not show the prosecution’s  
8 delayed disclosure of the videotape to be a violation of *Brady* or any rule established by  
9 any other United States Supreme Court precedent.

10 Lastly, Richard does not show that he was prejudiced by the delayed disclosure  
11 of the videotape. As is discussed above, the trial court did view the videotape and  
12 determined that it did not show Richard to be so intoxicated as to render his waiver of  
13 his rights involuntary. Richard alleges that the delayed disclosure of the videotape  
14 prevented him from consulting with an expert regarding it before the hearing on the  
15 motion to suppress, but he does not make any showing regarding what an expert may  
16 have seen in the videotape to support the motion to suppress.

17 Richard has not demonstrated that the Nevada Supreme Court’s rejection of this  
18 claim was “so lacking in justification that there was an error well understood and  
19 comprehended in existing law beyond any possibility for fair minded disagreement.” See  
20 *Harrington*, 562 U.S. at 103. The Court will deny relief on Ground 6.

#### 21 Certificate of Appealability

22 The standard for the issuance of a certificate of appealability requires a  
23 “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c). The  
24 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

25 Where a district court has rejected the constitutional claims on the  
26 merits, the showing required to satisfy § 2253(c) is straightforward: The  
27 petitioner must demonstrate that reasonable jurists would find the district  
28 court’s assessment of the constitutional claims debatable or wrong. The  
issue becomes somewhat more complicated where, as here, the district  
court dismisses the petition based on procedural grounds. We hold as  
follows: When the district court denies a habeas petition on procedural

1 grounds without reaching the prisoner's underlying constitutional claim, a  
2 COA should issue when the prisoner shows, at least, that jurists of reason  
3 would find it debatable whether the petition states a valid claim of the  
denial of a constitutional right and that jurists of reason would find it  
debatable whether the district court was correct in its procedural ruling.

4 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074,  
5 1077–79 (9th Cir. 2000). Applying this standard, the Court finds that a certificate of  
6 appealability is unwarranted.

7 Conclusion

8 **IT IS THEREFORE ORDERED** that Petitioner's Motion for an Evidentiary  
9 Hearing (ECF No. 75) is **DENIED**.

10 **IT IS FURTHER ORDERED** that Petitioner's Third Amended Petition for Writ of  
11 Habeas Corpus (ECF No. 51) is **DENIED**.

12 **IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability.

13 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter  
14 judgment accordingly.

15  
16 DATED THIS 29<sup>th</sup> day of December, 2020.

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19 KENT J. DAWSON,  
UNITED STATES DISTRICT JUDGE  
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